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Thirty-third session

SUMMARY RECORD OF THE 703rd MEETING

Held at Headquarters, New York,
on Thursday, 29 June 2000, at 3 p.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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The meeting was called to order at 3.10 p.m.

DRAFT LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

1. Mr. HERRMANN (Secretary of the Commission), said that the alternative to a model law could be a compilation of model legislative provisions on certain aspects of the Legislative Guide. The question of form, however, could be decided only after a general feasibility study had been done.

2. As to the financial implications, the length of time needed for drafting would be a factor. Also, if the proposed feasibility survey indicated that only five or six subject areas in addition to procurement required further work, the ultimate cost would be much lower than if all the subject areas in the Legislative Guide needed coverage. Moreover, if a working group was established, the cost would be in the range of at least $150,000 for two weeks; whereas the cost of assembling a group of experts to assist the Secretariat would be more limited. Owing to the existing schedules of the working groups, no time would be available for a working group session on any new topic until the next session of the Commission.

3. Mr. SARIE ELDIN (Egypt) said that the Legislative Guide was a fine achievement but had not gone far enough. A model law of the kind previously adopted by UNCITRAL would represent a major development in international business law. The proposed model law should be an enabling law, to be used irrespective of sector or of the details of any particular legal system.

4. As the Commission had already spent four years on the Guide, it would probably require no more than two years to prepare the model law. If work could not begin before the next UNCITRAL session, perhaps a group of experts could be asked to make a first draft in the interim. At the appropriate time, his delegation was prepared to submit a list of the major issues to be covered.

5. Mr. ATWOOD (Australia) said that he supported the comments made at the previous meeting by the United Kingdom representative. His Government was neutral but was prepared to be guided by the views of those who felt a model law was needed. The process was, however, likely to be time-consuming and expensive. The provisions of the Legislative Guide - a very useful tool in itself - would require thorough review. His delegation proposed that before committing time and resources to a further project on the topic, the Commission should assess the impact of the Legislative Guide itself, which might prove to be by and large sufficient. The Secretariat should seek the opinions of the users of the Guide, especially those States which would require further guidance and would benefit most from further UNCITRAL work in the field. It might be that any future work should focus on the legislative capacities of particular States rather than the development of a model law for all. At any rate, only after such assessments could the Commission make a fully informed decision.

6. Mr. LAMBERTZ (Observer for Sweden) said that he favoured considering the possibility of a model law or other instrument. It was too early to know if a working group would be appropriate, particularly as other projects had priority

in the working groups. In any case, in order not to lose the momentum generated by the adoption of the Legislative Guide, the Commission should decide now to authorize a feasibility study. With the assistance of experts, but without wasting time canvassing States, the Secretariat should determine which areas were suitable for further work and which of those areas should take priority. It could even begin to draft some provisions if that was deemed appropriate.

7. Mr. RENGER (Germany) said that there was room for more work on the subject. He himself was not as optimistic as the Egyptian representative about the two-year time-frame for a model law. Moreover, a decision to draft a model law might be counter-productive, for countries would hold back from using the Legislative Guide if they knew that further work was being done.

8. Generally, a model law was written as a uniform law, but a model law on privately financed infrastructure projects would be implemented according to the domestic context. It would therefore make sense to see how the Legislative Guide worked in practice before embarking on a model law. UNCITRAL could draw up a joint project with the United Nations Conference on Trade and Development, the World Bank and the Economic Commission for Europe to identify countries that needed legislation in the field and to work with them in drafting laws on the basis of the Legislative Guide. Once that had been done, the usefulness of a model law could be reconsidered.

9. Mr. MORÁN BOVIO (Spain) observed that UNCITRAL must proceed to unify law in an ordered and gradual way. Some time should be allowed to pass in order to assess the impact of the Legislative Guide and hear what States had to say regarding their efforts to modify domestic law. There were precedents in the Commission for moving from guide to model law: the UNCITRAL Legal Guide on Electronic Funds Transfers had led to the UNCITRAL Model Law on Electronic Commerce after 12 to 15 years of work and had put UNCITRAL at the forefront of that field. There was surely a need for a model law in the field of privately financed infrastructure projects but it had to be determined which of the 70 recommendations in the Guide should be included in such a law. Far more than two years would be needed. The Commission should wait until the next session, and perhaps convening a group of experts would then be the logical first step.

10. Mr. MOHAMED (Nigeria) said that countries should be urged to use the Legislative Guide while the Commission began to think about fashioning a model law. A group of experts could be invited to set out the possible parameters of a model law and submit a proposal to the Commission at its next session.

11. Mr. HERRMANN (Secretary of the Commission), after pointing out that the Commission itself was composed of experts, said that generally when the Commission set up expert groups, the members had to come at their own expense and were not expected to make policy decisions. There was no money for language interpretation. He cautioned against trying to set up a body that was like a working group in all but name.

12. It would be odd for the Commission, having just adopted the Legislative Guide, to address a question that would require a study of the considerable disparities in legislative approach among States, since it was those disparities which had led the Commission to decide on recommendations as the most suitable

form in the first place. It was true that the Commission had adopted very successful model laws in the past. In the case of the UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, however, the situation had been entirely different: the Commission had established common terminology and a descriptive guide before any country had enacted legal provisions dealing with the new technology.

13. Ms. SANDERSON (Observer for Canada) endorsed the suggestion that the Secretariat should conduct a feasibility study with the assistance of experts.

14. Mr. WALLACE (United States of America) said that eventually the Commission would need to establish a working group. He would be willing to prepare a list of 10 issues which could be the subject of a preliminary draft.

15. Mr. LALLIOT (France) said that his delegation was less optimistic than other delegations that the Commission would be able to complete a draft model law in one year or less. The European Union had been discussing such an instrument since the early 1990s and had been unable to conclude its work. Since the Commission's budget did not allow for the convening of a working group before the next session, he proposed that the Secretariat should convene an expert group whose composition would reflect all legal traditions. The expert group should determine whether a model law was feasible; if so, it should decide on the topics to be covered and begin work on a preliminary draft. It would then be for the Commission, and the Commission alone, to decide at a future session whether a working group was necessary and, if so, to establish its mandate.

16. The CHAIRMAN invited the Secretariat to advise the Commission on the feasibility of convening an expert group with the characteristics stipulated in the French proposal.

17. Mr. HERRMANN (Secretary of the Commission) said that the phrase "all legal traditions" was sufficiently vague to enable the Secretariat to meet that requirement.

18. Mr. ADENSAMER (Austria) said that he associated himself with those delegations which believed that a wait-and-see approach was indicated.

19. Mr. MARKUS (Observer for Switzerland) said that, since the Commission had already produced a legislative guide, it was doubtful whether there would be an immediate need for a model law. He also failed to understand the need for an expert group since the members of the Commission were all experts.

20. Ms. GAVRILESCU (Romania) said that it was far too early to tell whether a model law would be desirable.

21. Mr. MARADIAGA (Honduras) said that the legislative guide was an invaluable tool for governments that should not be overlooked. His Government had already adopted legislation based solely on the documents prepared for discussion in the Commission.

22. Mr. Al-NASSER (Saudi Arabia) said that he shared the views of those delegations which advocated a wait-and-see approach. The Legislative Guide might prove to have a less beneficial impact in certain countries than was hoped.

23. Ms. Li Ling (China) suggested that a working group should begin drafting a model law at the next session. If that effort was fruitful, then the Commission could decide whether to retain the Legislative Guide or replace it with the model law.

24. Mr. KONKKOLA (Finland) said that it was too early to decide on future work. The matter should be deferred to the next session. He suggested that the Secretariat should prepare a feasibility study listing the topics to be covered by a model law.

25. Mr. MORENO RUFFINELLI (Paraguay) said that much of the work to be done on a model law had already been completed. It would be prudent to wait for the Legislative Guide to be adopted and implemented in several countries in order to determine its practicability. Consultations should be held with Governments and experts.

The meeting was suspended at 4.25 p.m. and resumed at 5 p.m.

26. The CHAIRMAN invited the Commission to resume its discussion of a model law to be based on the Legislative Guide on Privately Financed Infrastructure Projects. The sense of the debate seemed to be that work on the topic should continue with a view to a model law, but perhaps not before the next session of the Commission.

27. Mr. MAZINI (Observer for Morocco) said that the finished Guide was a remarkable achievement in a short time, but, speaking as the representative of a developing country, he felt that a model law was needed in order to harmonize national laws on the subject and thereby facilitate international cooperation. The Guide had already identified the basic legal principles for such a law. His impression was that there was a strong consensus on the need to elaborate a model law, but also a recognition that it would be expensive. His delegation seconded the French proposal to assemble a group of experts in the course of the year to sketch out the broad outlines of such a law based on the principles set forth in the Guide.

28. Mr. MOHAMED (Nigeria) said that there seemed to be consensus on the need for a model law. The question at hand was how to preserve the momentum on the topic. Of the proposals put forward, the French proposal for an expert group, or perhaps an intergovernmental group, to meet during the course of the year seemed the most appropriate. It was probable that the expert group could prepare a draft for consideration by the Commission.

29. Mr. PINZÓN SÁNCHEZ (Colombia) said that his delegation was convinced of the importance of elaborating a model law, and, of course, the thinking already done on the Guide could move the project forward considerably, if momentum was maintained, since the law would be a logical extension of the Guide. However, in deciding how to go forward, the Commission should be mindful of the potential

problem raised by Germany. It would not be desirable for work on the model law to be construed as a lack of confidence in the Guide. In sum, his delegation was prepared to be flexible on the timing of the work, as long as there was basic agreement on the need for a model law.

30. Mr. DEWAST (Observer for the European Lawyers Union) said that the experience of France and the United Kingdom with the construction of the Eurotunnel had demonstrated the importance of a model law, even for developed countries. In the absence of such a mechanism of harmonization, the two countries had had to resort to special measures that had not proved entirely satisfactory. Hindsight had also made it clear that the sticking points were relatively few, concerning chiefly real estate on the United Kingdom side and financing guarantees and rate-setting on the French side. Adoption of a model law covering even a few central issues would have considerably facilitated the job of promoters and lenders involved in the Eurotunnel project.

31. The task the Commission was proposing to set itself might not be as insurmountable as it at first appeared and would indisputably be of value to developed and developing countries alike.

32. Mr. MORÁN BOVIO (Spain) said that his delegation believed that the next step was to disseminate the Guide to Governments and interested organizations and wait for feedback. If Governments requested help with their laws on privately financed infrastructure, that would be time enough to take action. There was always a danger that projects were self-perpetuating, without reference to reality. Efforts should be put into disseminating the Guide thoroughly.

33. The proposal of convening an expert group raised certain difficulties. It would not be easy to assemble jurists from all legal systems. Nor could the expert group elaborate a draft based on the recommendations alone. The Commission had no time during the present session to elaborate a mandate and terms of reference for such a group or to decide which of the 70 recommendations should be the focus of attention.

34. Mr. SARIE ELDIN (Egypt) said his delegation did not believe that the Commission should wait for reactions to the Guide. In any case, during the current discussion at least 12 countries had expressed the opinions of their Governments that a model law was called for. Naturally, financing and time constraints must be considered in deciding when and how to proceed, but the Commission could certainly take a decision in principle to go forward with a model law.

35. Mr. HERRMANN (Secretary of the Commission) said that the notion that an expert group might be able to draft provisions of a model law was in conflict with the Commission's settled practice that its texts were drafted only by the Commission or by a working group that was a subsidiary body of the Commission. On a practical level, the Commission had a very small budget to spend on expert groups.

36. During the consultation break, an idea had been raised which he would like the Commission to consider. Rather than rush into the drafting of a model law,

and possibly induce Governments to ignore the Guide while waiting for the law, the Commission could maintain momentum on the topic by holding a colloquium in collaboration with a partner, possibly a regional development bank. It had done something similar with its Colloquium on Cross-Border Insolvency prior to the elaboration of the Model Law on Cross-Border Insolvency.

37. The colloquium could probably be held during the first quarter of 2001, and experts on law reform assistance could be invited. It could serve the dual purpose of disseminating the Guide and exploring how much further one might go and in which subject areas. It would submit a report to the Commission at its next session, when the availability of working group time would be more evident.

38. The CHAIRMAN invited comments on the Secretary's suggestion of a colloquium and asked the members to bear in mind that it was not the Commission's practice to have expert groups draft its texts.

39. Mr. WALLACE (United States of America) said that a colloquium would be useful, because the Commission had not enjoyed the participation of many specialists in the field. However, if the Commission decided to hold a colloquium, he hoped it would not be too academic, and that the results of the Commission's work on the Guide would be available to the participants. While a model law would be of greatest benefit to the developing countries, it would also prove useful for developed countries, as experience had shown with the Eurotunnel. It was important to maintain momentum and also to avoid excessive complexity: seventy recommendations were too many, making it difficult to pin down the core provisions of the Guide.

40. The CHAIRMAN said that, if the Secretariat was to prepare the agenda for a colloquium, it would need clear guidelines from the Commission.

41. Ms. NIKANJAM (Islamic Republic of Iran) questioned whether the Commission should await reactions to the Guide before deciding whether to proceed with a model law. That might mean waiting a long time, because the State authorities concerned had many other things to deal with. It would be better for the Commission to pursue the work it had begun.

42. Mr. RENGER (Germany) said that the understanding of a model law now being expressed in the Commission was as a means of persuading legislators to enact law rather than as a tool for the harmonization of commercial law. He supported the proposal to hold a colloquium, within parameters set by the Commission and, if possible, with the help of other institutions which would be playing a part in disseminating the Guide.

43. Mr. ATWOOD (Australia) said that the preparation of a model law was not the only way to maintain the momentum of the Commission's work. He thought the holding of a colloquium would be an excellent idea as it would enable the Commission to gain an understanding of the practical difficulties of particular States and the kind of assistance they needed and to make an informed decision on whether the preparation of a model law was an appropriate response. It would also minimize the risk that the Guide might not be fully exploited if the Commission immediately began work on a model law.

44. Mr. REICHEL (World Bank) said he would seek to ensure participation by the World Bank in any colloquium organized by the Commission.

45. Ms. SANDERSON (Observer for Canada) supported the proposal for a colloquium. As the United States representative had pointed out, not all the experts in the field had been present at the session, so it was important not to opt for any particular direction in the Commission's work on it. It was also important to keep up the momentum, and a colloquium would be a useful means of doing so. A report from the colloquium could then be taken up by the Commission at its next session.

46. Mr. Al-NASSER (Observer for Saudi Arabia) said a colloquium could be a useful contribution to the preparation of a model law. A draft model law could be produced quite soon, perhaps within two years.

47. Mr. LALLIOT (France) said that a colloquium had just been held at the University of Paris to review the Eurotunnel project, which was an example of privately financed infrastructure. As for a colloquium on the Guide, it would have to be decided how it would be financed and organized, who would attend, and how it would be followed up. It must not be used as a smokescreen to avoid solving difficult issues. If those conditions were met, the idea was acceptable, although not the best solution.

48. Mr. SARIE ELDIN (Egypt) was afraid that holding a colloquium might merely delay progress on the topic for a further year, so that the momentum of the Commission's work would be lost. The rationale of its work, as the representative of Germany had said, was to promote the unification of commercial law, in both developed and developing countries. The preparation of a model law would not in any sense represent a deviation from that goal. However, he did not object to the proposal for a colloquium, provided that the Commission was clear about what it was intended to achieve.

49. The CHAIRMAN said that the Secretariat's intention was to have a wide-ranging colloquium, which should seek responses to the Guide and ideas for its implementation, not merely provide a forum for discussion. The outcome of the colloquium would be reported to the next session of the Commission, which would then have to decide what action to take.

50. Mr. SARIE ELDIN (Egypt) emphasized his concern that work might be delayed for another year, especially if the colloquium did not produce any specific conclusions on the viability of a model law.

51. Mr. WALLACE (United States of America) said that although the Commission had done some good work on the Legislative Guide, it should do more in order to meet the needs of the user countries and of other jurists. The proposed colloquium would serve that purpose if it focused on lawmaking and law reform.

52. Mr. MORÁN BOVIO (Spain) was convinced that a colloquium would be a very positive event. It was for the members of the Commission itself, rather than the Secretariat, to ensure its success. The colloquium should benefit from the views of experts and interest groups in the field.

53. The CHAIRMAN, summarizing the discussion, said that there was wide support in the Commission for holding a colloquium, provided that it made a real contribution to progress on the topic. It should address the need for further work on the Guide, identify the core provisions, obtain responses to the Guide and monitor its implementation. It should identify issues which could be dealt with in other ways, including by way of a model law. A report from the colloquium would be submitted to the Commission's next session. The Secretariat would endeavour to find a partner organization, preferably the World Bank, to assist with the organization of the colloquium, which should be open to anyone wishing to attend and should represent a wide range of views as well as the full spectrum of legal traditions. The colloquium should be held in the first quarter of 2001. If it was impossible for any reason to hold a colloquium, an expert group would be convened by the Secretariat, within resources available to it, which would proceed along the same lines and report to the Commission at its next session.

The meeting rose at 6.05 p.m.